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No. 97-1287

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1997

HUGHES AIRCRAFT COMPANY and
HUGHES NON-BARGAINING RETIREMENT PLAN
Petitioners,

v.

STANLEY I. JACOBSEN, DANIEL P. WELSH,
ROBERT E. MCMILLIN, ERNEST O. BLANDIN, and
RICHARD E. HOOK,
Respondents.

**On Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit**

AMICI CURIAE BRIEF OF THE HUGHES AIRCRAFT RETIREES ASSOCIATION AND HUGHES EMPLOYEES ASSOCIATION IN SUPPORT OF PETITIONERS

DAVID E. GORDON
Counsel of Record
DAVID A. WIMMER
CARLA J. BENNETT
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, CA 90071
(213) 669-6000
*Counsel for Amici Curiae
Hughes Aircraft Retirees
Association and Hughes
Employees Association*

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Hughes Aircraft Retirees Association ("HARA") and the Hughes Employees Association ("HEA") respectfully submit this Amici Curiae Brief in support of Petitioners, Hughes Aircraft Company ("Hughes") and Hughes Non-Bargaining Retirement Plan (the "Plan").[1]

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[1] Pursuant to Supreme Court Rule 37.6, this Brief was authored in its entirety by attorneys at O'Melveny & Myers LLP, counsel for HARA and HEA. HARA and HEA were the only persons or entities who made a monetary contribution to the preparation and submission of this Brief.

The consent of counsel for Petitioners and Respondents has been obtained and is filed concurrently herewith.

NATURE OF THE INTEREST OF THE AMICI CURIAE

The Supreme Court should approach this case without illusion as to the consequences of this matter on the Hughes' employees who participate in the Plan and on the Hughes' retirees under the Plan.

A. Hughes Employees Association -- HEA was incorporated as a non-profit California corporation in 1953. Membership in HEA is extended to all employees of Hughes. HEA members are participants in the Plan.

HEA's opposition to the Ninth Circuit's Jacobson decision is hardly unexpected. Judge Norris' dissent refers to the "serious adverse consequences" that the majority's decision will have upon the current employee participants in the Plan. See Petition for Writ of Certiorari ("Petition") at 48a. Either Plan termination or the inability to use Plan assets to fund the noncontributory feature of the Plan would work a substantial hardship on HEA's members. For these reasons, HEA opposes the Ninth Circuit's decision in its entirety.

B. Hughes Aircraft Retirees Association -- HARA represents Hughes' retirees. It was formed in 1986 as a non-profit organization by Hughes' retirees. HARA's goals are to provide an educational and social forum for Hughes' retirees and to provide them with an opportunity

to participate in group activities and community service. From its initial base of less than 20 members, HARA has grown to a membership of over 900 Hughes' retirees, residing primarily in Southern California, but also elsewhere. Although HARA is recognized as an organization by Hughes, it is an independent retiree organization operating under its own bylaws and governed by a 26-person volunteer board of directors.

HARA's participation in this Brief may seem surprising because Respondents have asserted, and convinced the Ninth Circuit, that the retirees would favor the results in the majority opinion. This is not the case. The HARA Board has thoroughly reviewed this matter and has concluded that the Ninth Circuit's opinion is erroneous and will, on balance, make retirees worse off. How HARA reached this conclusion is explained below.

SUMMARY OF ARGUMENT

Termination of the Plan significantly harms Hughes' employees and retirees by eliminating cost-of-living increases to the thousands of persons who retired from Hughes after 1990, by denying the possibility of future ad hoc pension increases, and by withdrawing the current federal-agency guarantee that protects Hughes' pension promises -- all to an extent far greater than the one-time monetary distribution each Plan participant might receive upon Plan termination. For these reasons, HARA and HEA fully support Petitioners' arguments and urge this Court to reverse the decision of the United States Court of Appeals for the Ninth Circuit.

ARGUMENT

I. TERMINATION OF THE PLAN AND DISTRIBUTION OF PLAN ASSETS WILL DETRIMENTALLY AFFECT HARA AND HEA MEMBERS.

It is obvious why current employees are severely harmed by the Ninth Circuit's holding that the Plan has been terminated. What may be less obvious, however, is why current retirees, the class supposedly benefited by the Ninth Circuit's decision, will be harmed if the Ninth Circuit's misreading of the law is not remedied. In fact, HARA's members are harmed by Respondents' attempt to treat the Plan as terminated as of January 1, 1991 (Complaint ¶ 42, Petition at 141a) and to require immediate distribution of all Plan assets (Complaint ¶ 56, Petition at 143a). While a termination may, at first, appear beneficial to Hughes' retirees, the only persons certain to gain from this outcome are Respondents' lawyers. This portion of the Brief explains why a termination decision harms Hughes' retirees. [While the arguments set forth below apply with equal force to Hughes' active employees, for ease of explanation, this portion of the Brief simply will refer to HARA and the Hughes' retirees.]

The singular disadvantage of plan termination is that the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, et seq., ("ERISA") generally requires that all plan assets be distributed in the form of annuity contracts. ERISA § 4041(b)(2)(D), 29 U.S.C.

§ 1341(b)(3); 29 C.F.R. § 4041.3. This has several consequences:

First, although the contributory feature of the Plan generally contains a maximum 4% cost-of-living adjustment (see Plan § 4.13-A, App. A),[2] the Plan provides that, in the event of its termination, cost-of-living increases are only available to participants who already have retired as of the date of termination. See Plan § 4.13-A(c), App. A. The cost-of-living feature would thus be lost for the thousands of persons who retired after 1990, the date of the Plan's alleged termination.

Second, Plan termination will cause all retirees to lose the possibility of any future pension increases that might otherwise be financed from the Plan's surplus. For example, because the Plan's cost-of-living adjustment feature is limited to a 4% annual increase (see Plan § 4.13-A, App. A), the only source of protection for future inflation increases in excess of 4% would be in the form of ad hoc amendments by Hughes financed from the Plan's surplus. But no such surplus will exist if all Plan assets are distributed.

There is, however, an even more fundamental problem. The distribution of annuity contracts on Plan termination relieves the Pension Benefit Guaranty Corporation ("PBGC"), the federal agency that otherwise

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[2] For the Court's convenience, Appendix A contains Section 4.13-A, Cost of Living Adjustment, Hughes Non-Bargaining Retirement Plan, which is properly before the Court at page 339 of Appellants' Excerpts of Record.

guarantees benefits, from what otherwise would be its obligation to stand behind Hughes' pension promises. PBGC Op. No. 91-1 ("the statute does not authorize PBGC to guarantee benefits distributed in the form of irrevocable annuity contracts from insurance companies."), 1991 Westlaw 80739 at *1 (P.B.G.C.), Pens. Plan Guide (CCH) ¶ 23,824. In light of the well-known insolvencies of Executive Life Insurance Company and Mutual Benefit Life Insurance Company (both of which were highly rated until shortly before their insolvencies), HARA understandably prefers the greater safety of an unterminated Plan with PBGC protection. This provides both the safety margin of today's surplus (including its maximum 4% cost-of-living adjustment and the possibility of future ad hoc pension increases) and, if the Plan is later terminated, a federal-agency guarantee.

The HARA Board carefully considered the possibility that the decreased security and loss of potential pension increases would be offset by Respondents' hoped-for increase in pension benefits upon Plan termination. The possibility of any such increase, however, may prove illusory.

For example, while Respondents assert that the entire surplus belongs to them, Hughes may not agree. Using Respondents' own estimates of employee and employer contributions (Complaint ¶ 21, Petition at 135a-136a), it would appear that at least 60 percent of the surplus could be claimed by Hughes, leaving only 40 percent available to be split between Hughes' retirees and

employees.[3] HARA further estimates that, based on the 1995 actuarial report for the Plan by the independent actuarial firm of Towers Perrin, retirees would be entitled to about 70 percent of the surplus not claimed by Hughes, and active employees would be entitled to the remaining 30 percent of the surplus not claimed by Hughes. (This 70/30 split is based on the relative value of benefits allocable to each two groups.) As a result, the $1.2 billion surplus at December 31, 1990 (Complaint ¶ 23, Petition at 136a) may only result in $336 million being available for retirees (70% of 40% of $1.2 billion equals $336 million) -- an increase far less valuable to HARA than the security for benefits provided by the surplus.

What has not been mentioned in the lawsuit at this point, as it could not be at the pleading stage, is the fact that the Department of Defense, which has been Hughes' largest customer for many of the years in question, can be expected to assert a claim to a substantial portion of any pension surplus, as it generally does when a company that has derived revenue from government contracts terminates

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[3] ERISA generally provides that any available surplus is allocated between the value of employer and employee contributions. See ERISA § 4044(d), 29 U.S.C. §1344(d). HARA developed its estimates of these two amounts by increasing the contributions set forth in Complaint ¶ 21 (Petition at 135a-136a) by eight percent interest and comparing the total value of employer and employee contributions as of December 31, 1990. This inexact method is, of course, no substitute for the actual calculations that would be required in order to divide the surplus. Nevertheless, it was necessary for HARA to undertake some type of estimating process to assess the impact of Jacobson on its members.

an overfunded pension plan.[4] Although the effect of such a claim is uncertain at this time, it could result in a further reduction of surplus.[5]

In sum, the 1995 actuarial report by Towers Perrin states that the present value of retirement benefits at that time was $2.55 billion. When one measures this amount against the portion of the surplus that Hughes' retirees might actually receive, HARA concludes that the potential

[4] 48 C.F.R. § 31.205-6(j)(4) provides in pertinent part:

> Termination of defined benefit pension plans. When excess or surplus assets revert to the contractor as a result of termination of a defined benefit pension plan, or such assets are constructively received by it for any reason, the contractor shall make a refund or give a credit to the Government for its equitable share of the gross amount withdrawn....

[5] Exactly how the regulations governing the allowance of pension costs in government contracts apply will vary depending on the nature of each individual contract. Moreover, the way any such claim would be treated in a case like this one, where a court rules that a termination occurred (rather than a situation where a company voluntarily terminates its plan to recover surplus) is unknown. Therefore, it is difficult to say exactly how any such claim would affect the size of the plan surplus. Nevertheless, we note that government contractors generally may only include as a pension cost the cost of pension benefits as provided for in the benefit plan that is in effect at the time of the contract. 48 C.F.R. § 9904.412-50(b)(5) ("Pension cost shall be based on provisions of existing pension plans. . . ."); 48 C.F.R. § 9904.412-60(b)(3) ("in calculating pension costs, the contractor may not assume future benefits greater than that currently required by the plan"). This could potentially allow the government to claim the whole surplus to the extent it exceeds the benefits provided by the Plan formula that existed at the time of the government contracts.

benefit increase might amount to no more than 5 or 10 percent and, for the reasons described above, might be much less. This potential increase is not worth giving up the additional security provided by a PBGC guarantee, possible future ad hoc pension increases similar to those Hughes has granted in the past, and, for some retirees, the promise of cost-of-living pension increases.

II. PLAN TERMINATION HAS NOT OCCURRED. THE PLAN HAS BEEN AND REMAINS ONE PLAN.

HARA and HEA also submit that, as a matter of law and contrary to the decision of the Ninth Circuit, no Plan termination has occurred. Moreover, the Ninth Circuit erred in finding that the addition of the non-contributory benefit structure to the existing Plan on January 1, 1991, created two distinct plans, even though all benefits continue to be paid from a single trust fund. The suggestion of the Ninth Circuit that, at least under certain circumstances, multiple plans exist for purposes of ERISA even when all trust assets are available to pay all benefits would spread confusion throughout the appellate circuits and is inconsistent with the existing case law and regulations. Employers, employees, and retirees would not know what new rules would apply. As Petitioners more fully develop in their brief of the merits, the Plan constitutes one plan within the meaning of ERISA -- both before and after the January 1, 1991 amendment. In this regard, HARA and HEA adopt and fully agree with Petitioners' arguments.

CONCLUSION

For the foregoing reasons, Hughes Aircraft Retirees Association and Hughes Employees Association respectfully submit that this Court should reverse the judgment below and remand this matter for action in accordance with this Court's decision.

DATED: July 2, 1998.

Respectfully submitted,

David E. Gordon

David E. Gordon
(Counsel of Record)
David A. Wimmer
Carla J. Bennett
O'Melveny & Myers LLP
400 South Hope Street
Los Angeles, CA 90071
(213) 669-6000

Counsel for Amici Curiae
Hughes Aircraft Retirees Association
And Hughes Employees Association

APPENDIX

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APPENDIX A

SECTION 4.13-A, COST OF LIVING ADJUSTMENT, HUGHES NON-BARGAINING RETIREMENT PLAN

Section 4.13-A of the Hughes Non-Bargaining Retirement Plan, entitled "Cost of Living Adjustment," states:

(a) The monthly Benefit payable under Section 4.2-A(a)(i) of the Normal Retirement Benefit, 4.7-A(a)(i) of the Early Retirement Benefit or 4.9-A(a)(i) of the Late Retirement Benefit or in respect of a Participant during any Plan Year (the "subject Plan Year") after the first Plan Year in which monthly Benefits were so payable shall be adjusted by multiplying the monthly Benefit so payable during the Plan Year immediately preceding the subject Plan Year (after applying the Cost of Living Adjustment to such preceding Plan Year) by a factor (not over 1.040 and not under 0.960) computed to at least three decimal places, determined by dividing:

(i) the United States Bureau of Labor Statistics Consumer Price Index (All Urban Consumers, all items, United States city average, 1967 = 100) as revised, for the September next before the subject Plan Year

by

(ii) such Index for the September of the second year before the subject Plan Year.

(b) Notwithstanding the provisions of subsection (a), the adjustment provided in such subsection shall not result in a monthly Benefit less than the monthly Benefit initially payable to or in respect of the Participant.

(c) If the Plan is terminated under Section 6.1, no further adjustments shall be made under this Section, except as to Former Participants who had retired under a Normal Retirement Benefit, Early Retirement on or after his fifty-fifth (55th) birthday or Late Retirement Benefit (but not if his Separation from the Service was prior to being Vested) on or prior to the date of such termination.

(d) No adjustment shall be made under this Section to a Benefit payment payable in a lump sum on the death of a Participant as described in Section 4.2-A(a)(ii) of the Normal Retirement Benefit.